Toh Huat Khay v Lim A Chang (in the capacity of an executor for the estate of Toh Hoy Kay, deceased)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–295 OF 2005
GOPAL SRI RAM, ZAINUN ALI AND HASAN LAH JJCA
19 FEBRUARY 2008

Land Law — Title — Indefeasibility of title — Land transferred without regard to express restrictions in title — Whether act of land administrator in registering such transfer unlawful, null and void — Whether transferee would obtain defeasible title

Land Law — Transfer — Indefeasibility of title — Land transferred without regard to express restrictions in title — Whether act of land administrator in registering such transfer unlawful, null and void — Whether transferee would obtain defeasible title

Land Law — Transfer — Registration — Land administrator — Transfer of land — Whether action of land administrator unlawful, null and void

TKC was the registered owner of a piece of land. The title was issued on 25 September 1996. It carried an indorsement prohibiting any transfer for a period of 10 years — that is until 25 September 2006. Thereafter, transfer was permitted with the consent of the state authority. However in 1996 itself, TKC applied to have the land transferred to the appellant. The Director of Lands and Mines ('the director') purported to approve this transfer and the land was eventually transferred and registered in the appellant's name on 31 March 1998. The respondent applied to set aside the transfer, which application was allowed by the High Court. The appellant thus appealed to the Court of Appeal. The issue for determination was whether the director had acted lawfully in consenting to such transfer, notwithstanding the express condition and/or restriction in interest as indorsed on the title.

Held, dismissing the appeal:

(1) The power to impose conditions is vested in the state authority by s 120 of the National Land Code ('NLC'). Section 124 of the NLC confers upon the state authority the power to alter or rescind any conditions expressed in a title (see para 3).

(2) In the instant case, TKC did not apply to the state authority to rescind the express restriction in the title. Instead, TKC merely applied for permission to transfer the land to the appellant. The director therefore had no power whatsoever to act as he did since the repository of that power was the relevant state authority. Therefore, the act of the land administrator in the registering the transfer to the appellant was unlawful, null and void. Consequently, the appellant obtained a title that was defeasible in his hands (see para 4).

(3) In the instant case, the appellant obtained no title in consequence of the director acting in breach of the NLC. The High Court was therefore correct in making the orders it did (see para 6); *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 followed and *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 referred.

[Bahasa Malaysia summary

TCK adalah pemilik berdaftar ke atas sebidang tanah. Hak milik telah dikeluarkan pada 25 September 1996. Ianya terkandung pengindorsan yang melarang mana-mana pindah milik bagi tempoh 10 tahun — iaitu sehingga 25 September 2006. Kemudiannya, pindah milik telah dibenarkan dengan kebenaran pihak berkuasa negeri. Tetapi pada 1996, TKC telah memohon untuk memindah milik tanah tersebut kepada perayu. Pengarah, Tanah dan Galian ('pengarah') memberikan kelulusan untuk pindah milik dan tanah tersebut kemudiannya telah dipindah milik dan didaftarkan di atas nama perayu pada 31 Mac 1998. Responden telah memohon untuk mengenepikan pindah milik tersebut yang mana permohonan telah dibenarkan oleh Mahkamah Tinggi. Perayu kemudiannya merayu ke Mahkamah Rayuan. Isu untuk dipertimbangkan adalah sama ada pengarah telah bertindak mengikut undang-undang dalam membenarkan pindah milik tersebut, meskipun syarat dan/atau sekatan kepentingan yang jelas dinyatakan seperti yang diindorskan dalam hak milik.

Diputuskan, menolak rayuan:

(1) Kuasa untuk melaksanakan syarat-syarat adalah terletak kepada pihak berkuasa negeri oleh s 120 Kanun Tanah Negara ('KTN'). Seksyen 124 KTN mengurniakan terhadap pihak berkuasa negeri kuasa untuk mengubah atau membatalkan mana-mana syarat yang dinyatakan di dalam hak milik (lihat peranggan 3).

(2) Dalam kes ini, TKC tidak memohon kepada pihak berkuasa negeri untuk membatalkan sekatan langsung yang dinyatakan dalam hak milik. Sebaliknya, TKC hanya memohon untuk kebenaran memindah milik tanah kepada perayu. Pengarah tersebut oleh itu tidak

mempunyai apa-apa kuasa untuk bertindak seperti mana yang telah dilakukannya, kerana pihak yang berkuasa adalah pihak berkuasa negeri yang releven. Oleh itu, tindakan pentadbir tanah dalam mendaftarkan pindah milik kepada perayu adalah salah dari segi undang-undang, batal dan tidak sah. Oleh yang demikian, perayu memperoleh hak milik yang boleh disangkal (lihat perenggan 4).

(3) Dalam kes ini, perayu tidak memperolehi hak milik disebabkan oleh pengarah yang bertindak melanggar KTN. Mahkamah Tinggi oleh itu adalah betul dalam perintah yang telah dibuat (lihat peranggan 6). *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 (diikut); *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (dirujuk).]

Notes

For cases on indefeasibility of title, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4578–4581.

For cases on registration of transfer of land, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4642–4648.

Cases referred to

M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Teh Bee v K Maruthamuthu [1977] 2 MLJ 7 (folld)

Legislation referred to

National Land Code ss 109(2)(a), 120, 124

Mahinder Singh Dulku (Mahinder Singh Dulku & Co) for the appellant.
Tan Kah Hoo (Gan Teik Chee & Ho) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is a tolerably plain case. The facts of immediate relevance are straightforward; the applicable law well settled. The parties in the appeal are all related by blood. The dispute between them centres upon a piece of land registered in the name of one Tang Kah Choo. The title to the land in question carries an indorsement which absolutely prohibits its transfer to any person for a period of 10 years and thereafter permits its transfer only with the consent of the state authority. The title was issued on 25 September 1996. According to the terms of the indorsement, it could not be transferred at all until 24 September 2006 and thereafter only with the consent of the state authority. It appears that in 1996, an application was made by Tang Kah Choo (though in his evidence the appellant, who was the defendant in the court below, acknowledged that he was the real applicant) to have the land transferred to the appellant. Despite the express terms of the indorsement, the

director of lands and mines purported to approve this transfer and the land was eventually transferred and registered in the appellant's name on 31 March 1998. The respondent (the personal representative of the appellant's brother's estate) brought an action to set aside the transfer. The High Court found for the respondent. The appellant appealed to us. He failed. The reasons for our decision are now produced.

[2] The only issue in this appeal is whether the transfer to the appellant is valid. The appellant relies on the purported consent given by the director of lands and mines. So, everything turns upon whether the director acted lawfully in giving his consent. That depends on whether he acted in accordance with the relevant written law, in this case, the National Land Code 1965 ('the Code').

[3] Now, s 109(2)(a) of the Code which applies to the subject land provides that such land shall, upon alienation, become subject to:

> such express conditions and restrictions in interest (if any) as are then endorsed on the document of title thereto (or referred to therein), being conditions and restrictions imposed by the state authority under the powers conferred by ss 120 to 122.

The power to impose conditions is vested in the state authority by s 120 of the Code. Additionally, s 124 of the Code confers upon the state authority the power to alter or rescind any conditions expressed in a title.

[4] In the present case, Tang Kah Choo did not apply to the state authority to rescind the express restriction prohibiting transfer for a period of 10 years from the date of the alienation. Instead, she merely applied for permission to transfer the land to the appellant. The director therefore had no power whatsoever to act as he did since the repository of that power was the relevant state authority. It follows that the act of the land administrator in the registering the transfer to the appellant was unlawful, null and void. Consequently, the appellant obtained a title that was defeasible in his hands.

[5] In *M & J Frozen Foods Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294, Wan Yahaya SCJ quoted with approval the following passage in the judgment of Ajaib Singh J, (as he then was) in *Teh Bee v Maruthamuthu* [1977] 2 MLJ 7 in relation to the nature of a title obtained in violation of the provisions of the Code:

> I held that in the present case the alienation of the land under qualified title to the respondent did not involve a mere irregularity or non-compliance with the statutory procedure relating to the method of acquiring alienation of qualified title but that the state authority had acted ultra vires the National Land Code and therefore the alienation of the land under qualified title was illegal and a nullity.

Consequently, the conclusiveness of title and the indefeasibility provisions in the Code were rendered irrelevant and inapplicable.

[6] The position here is a fortiori. If the act of the state authority in violating the Code gave no title to *Teh Bee* so too in the present case the appellant obtained no title in consequence of the director acting in breach of the Code. The judge was therefore correct in making the orders he did. The appeal was accordingly dismissed and those orders made that are usually consequent upon a dismissal.

[7] My learned sister Zainun Ali JCA and my learned brother Hasan Lah JCA have seen this judgment in draft and have expressed their agreement with it.

Appeal dismissed.

Reported by Andrew Christopher Simon